No. 80-822

In the Supreme Court of the United States

OCTOBER TERM, 1980

JANE LIVINGSTON, ADMINISTRATRIX OF THE ESTATE OF HALDON C. LIVINGSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that federal admiralty jurisdiction encompasses a tort claim arising from a pleasure-boat accident on a dam-obstructed, wholly intrastate body of water that has not been used for commercial shipping in 40 years.

1. Petitioner Jane Livingston is the representative of the estate of Haldon C. Livingston, who drowned as a result of a pleasure-boating accident while fishing on the North Fork River in north-central Arkansas. The decedent's rented fishing boat struck a partially concealed steel cable that ran from the top of a 12-foot post on the shore down to and through the water and was anchored in the river bed. The decedent somehow became wedged between the cable and the boat and was pinned underwater (Pet. App. 12-13).

The North Fork River was once the site of significant commercial traffic. However, since at least 1941, when a hydroelectric dam was built, traffic on the river has been limited almost exclusively to recreational fishing (Pet. App. 15-17). The United States, through the Army Corps of Engineers, owns the river and both banks in the area of the accident (*id.* at 12). The cable (together with the post to which it was attached) was a remnant of a temporary bridge built in the 1940's by the contractor who built the dam. The contractor removed the bridge in 1945 but apparently overlooked the cable (*id.* at 13).

Petitioner brought two civil actions in the United States District Court for the Western District of Arkansas, one in admiralty and the other under the Federal Tort Claims Act, which were subsequently consolidated for trial. The district court entered judgment for the United States on the tort claim but ruled against the government on the admiralty claim (Pet. App. 23-42) and awarded petitioner damages of $192,800 (*id.* at 12). In ruling on the admiralty claim, the court held that it possessed the requisite jurisdiction because the North Fork River had once been navigable and had been used as a commercial artery prior to the construction of the hydroelectric dam in 1941. The court found unpersuasive the fact that the river is not currently used for commercial purposes and that the presence of the dam makes interstate travel impossible (*id.* at 33-40).

The court of appeals reversed (Pet. App. 11-22), holding that "admiralty jurisdiction was improperly invoked in this case" (*id.* at 12). The court stated that "the concept of 'navigability' in admiralty is properly limited to describing a present capability of waters to sustain commercial shipping" regardless of their historic usage (*id.* at 21).

2. The decision below is correct, is consistent with decisions of this Court, and does not conflict with any decision

of another court of appeals. Further review is therefore unwarranted.

The court of appeals correctly rejected the district court's assumption of jurisdiction based on historical navigability, citing (Pet. App. 20) this Court's recent admonition in *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 (1979) (citation omitted), that cases defining navigability must be evaluated carefully in light of " 'the *purpose* for which the concept of 'navigability' was invoked in a particular case.' " As the court of appeals noted, *Kaiser Aetna* makes clear that definitions of navigability in Commerce Clause cases, given the historical breadth of the commerce power, necessarily will be more expansive than in "other contexts where the actual capability of a stream to support navigation is critical. What is required in those contexts is a functional analysis of 'navigability,' so that the limits of governmental authority are determined in accordance with the purposes it serves" (Pet. App. 20; citation omitted). Since "admiralty jurisdiction had its genesis in the felt need to provide a uniform body of law governing navigation and commercial maritime activity" (*id.* at 20-21), the absence of actual commercial shipping on a waterway eliminates the rationale for exercising admiralty jurisdiction over recreational accidents on that waterway. In short, the fact that commercial activity once flourished on the North Fork River is simply irrelevant to the present determination of admiralty jurisdiction.

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870), and *The Montello*, 87 U.S. (20 Wall.) 430 (1874), although brought in admiralty, involved the scope of the commerce power and are therefore plainly distinguishable from the instant case. *Economy Light & Power Co.* v. *United States*, 256 U.S. 113 (1921), a case concerned with the scope of judicial power under the Rivers and Harbors Act of 1899, is similarly distinguishable, as is *Rochester Gas and Electric*

Corp. v. *FPC*, 344 F. 2d 594 (2d Cir. 1965), which rested on both the commerce power and the Rivers and Harbors Act by analogy. See *Kaiser Aetna* v. *United States, supra,* 444 U.S. at 171-172.

Finally, the decision in this case is fully in accord with *Adams* v. *Montana Power Co.*, 528 F. 2d 437 (9th Cir. 1975), and *Chapman* v. *United States,* 575 F. 2d 147 (7th Cir.) (en banc), cert. denied, 439 U.S. 893 (1978), in which the courts of appeals rejected claims that a waterway's previous history as a commercial shipping route conferred federal admiralty jurisdiction over recreational boating accidents in the absence of significant current commercial activity.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981

DOJ-1981-01